No. 15,653

United States Court of Appeals

For the Ninth Circuit

HARRY T. VON EICHELBERGER and HAIG MIHRAM TERZIAN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' REPLY BRIEF.

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Simply stated, appellants contend that the transfer of possession of the machine guns here in issue which occurred in December, 1956, is a transfer outside the scope and meaning of Chapter 53, Title 26, U.S.C. If there was no taxable transfer, the penalties invoked by appellee pursuant to 26 U.S.C. 5851 and 5861 are inapplicable.

Appellee cites *Montgomery v. United States,* 146 F. 2d 142 and *Rayborn v. United States,* 345 F. 2d 368 for the proposition that it was the intent of Congress to tax any transfer of possession. *Montgomery v.*

United States, ante, 146 F. 2d 142 is clearly inapplicable. It is a pleading case on its face. Defendant appellant had pleaded guilty to two charges, one, the improper *possession* of a machine gun upon the transfer of which no tax was paid and the second charge, that of *receiving* such an illegally transferred weapon. Appellant moved to vacate one of the judgments. He claimed that there was but one indivisible culpable act so that his consecutive sentences of five years and five years on each count constituted double punishment. The Court of Appeals held otherwise. So likewise is *Rayborn v. United States, ante,* 345 F. 2d 368 an identity of offense and pleading case. Consequently it is inapplicable. From the opinions of the instant Court of Appeals it cannot be determined, how or in what manner the several appellants had obtained possession of weapons in question. Certainly from these cited cases, no broad congressional intent to tax the mere transfer of possession may be drawn, imputed or inferred.

Congress has the constitutional power to tax a transfer of possession of machine guns from one person to another, *Sonzinsky v. United States,* 300 U.S. 506, 57 S.Ct. 554, 81 L.ed 772, *United States v. Cumbee,* 84 F. Supp. 390 and *United States v. Adams,* 11 F. Supp. 216. However, from this it obviously does not follow that all transfers of machine guns are violative of the statutes, particularly if Congress employs restrictive methods of definition as to what is a taxable transfer.

That appellants have not violated the *literal terms* of the statute is apparent. To bring them within the

statutory purview, appellee belabors the obvious, namely racketeers, gunmen and desperadoes, in a patent effort to expand the scope of the statute beyond that which Congress intended.

The phrase "or otherwise dispose of" is said by appellee to bring within the statutory intendment any "physical transfer of firearms" (page 15, Brief for the Appellee) or any "passage of physical possession" (page 15, Brief for the Appellee).

The term or expression "dispose of" according to the text writer in 27 C.J.S. 345 is said to have "no technical signification" and to be "nomen generalissimum", *Phelps v. Harris,* 101 U.S. 370, 25 L.ed 155. When "otherwise disposed of", is coupled with, preceded by or associated with "sale" it applies only to those transactions in which there has been a transfer of title or absolute possession of the property, *Scott v. State,* 6 Ga. App. 332, 64 S.E. 1005 and *State v. Gorman,* 113 Kan. 740, 216 P. 290.

Phelps v. Harris, ante, 101 U.S. 370, 25 L.ed 155, is of interest because of the peculiar nature of the problem at hand. The construction of a will and codicil was in issue. The will gave the trustee power "to sell or exchange" property. The codicil gave the trustee power "to dispose of" the property. The trustee partitioned land within his control. The Court held the partition to be valid as being within the scope of "to dispose of". By dictum, however, the Court said that had the words "to dispose of" been placed in context with and adjacent to "sell" a restricted meaning would then be given.

"prosecution" and "disposition of" the action for the collection of the statutory penalties. By "disposition" was meant the "administrative proceedings to obtain forfeitures." The Court held that prosecution and disposition were nearly identical and closely related functions to obtain the same results and that "disposition" meant to settle, adjust or *finally fix* or determine a matter.

The decisions of the several state courts are classifiable upon the basis of a division between civil and criminal proceedings. In the former, or civil proceedings, two lines of authority may be found. One line of authority exemplified by *Roe v. Burt,* 66 Okla. 193, 168 P. 405 holds that when "dispose of" is associated with "sell" or "sale" an expanded meaning is attached to "dispose of" on the theory that "sell" is a "lesser and included" means of disposition. "Disposition" or "to dispose of" is described as "to exercise *finally* one's power to control over, to pass over into the control of someone else, as by selling, to *alienate,* to *part with,* to relinquish or to get rid of."

Of similar import is *People v. Rathbun,* N.Y., 21 Wend. 509, 526-527, wherein the Court said "dispose of" was equal to and synonymous with "putting away".

See also *Barnard v. Barnard,* 91 Ga. App. 502, 86 S.E. 2d 533, 536 wherein "dispose of" was held to mean *"to divest one's self of all rights and interest* in the thing." In "Barnard", the defendant had mortgaged the property in issue. The Court said that this was not a disposition within the meaning

of an acknowledgment of indebtedness which ordered defendant to pay to plaintiff on a debt should defendant "sell, exchange or otherwise dispose of" the property. Likewise equating sales, alienation and disposition is *Bieg v. Shamel,* 129 C.A. 2d 700, 708, 277 P. 2d 842. This line of authority is comparable therefore to the federal cases herein discussed as personified by *Platt v. Union Pacific R. R. Co.,* ante (1878), 99 U.S. 48, 59, 25 L.ed 424, 427, *Phelps v. Harris,* 101 U.S. 370, 25 L.ed 155 and *Dayton Brass Casting Co. v. Gilligan,* ante, 267 F. 872, and equates "dispose of" with alienation.

The other line of authority in civil cases is exemplified by *Hawxhurst v. Rathgeb,* 119 C. 531. Citing California cases and cases from other jurisdictions, it was held therein that where a grant of power was made to another where language such as "sell, transfer, and release" was utilized, that no implied and lesser powers such as "to mortgage or otherwise dispose of the property" were granted. It is an example of strict interpretation.

As to criminal cases, the writer ascertained the existence of two lines of authority. What may be called the expanded interpretation or liberal rule is exemplified by *State v. Deisting,* 33 Minn. 102, 22 N.W. 442. Defendant was convicted of giving a drink of beer to a friend pursuant to the terms of a statute that said "No person shall sell, vend, deal in, or dispose of any spirituous (sic), . . . malt . . . liquor". The Court said "dispose of" was meant to include other forms of disposal than those indicated by the preceding

words in the ordinance. *"Ejusdem generis"* was not applied nor was *"noscitur a sociis"*. See also two Delaware cases, *State v. Handy,* 105 A. 426, and *State v. Rothman,* 105 A. 427.

The overwhelming majority of state court decisions in criminal appeals holds that where "dispose of" or "otherwise dispose of" are found in association with sale or sell, convey, gift or give away, *"noscitur a sociis"* requires that "dispose of" be limited in meaning to transactions comparable to the associated words, i.e., sale, conveyance or gift. The following cases and jurisdictions are but a representative segment: *State v. Julien,* 48 Iowa 445, 447, *State v. Nienaber,* 347 Mo. 541, 148 S.W. 2d 537, 539, *Bullene v. Smith,* 73 Mo. 151, 161, *Scott v. State* (Georgia), 64 S.E. 1005, *Stenson v. State,* 43 Ga. App. 582, 159 S.E. 777, 778, *Roberson v. State,* 3 Texas App. 502, *In re Carr,* 16 R.I. 645, 19 Atl. 146, *Roberson v. State,* 100 Ala. 37, 14 So. 554, *Wood v. Territory,* 1 Ore. 223, *Albrecht v. People,* 78 Ill. 510, *Cruse v. Aden,* 127 Ill. 231, 20 N.E. 73 and *State v. Standish,* 37 Kan. 642, 10 P. 66.

Whichever view of the law is taken, either the liberal expanded version which equates "dispose of" with "alienation" or the restricted, association version which results from application of *noscitur a sociis,* the conditional sales transaction here in issue fails to constitute an alienation or final dispossession as concerns appellant von Eichelberger. Title to the guns remains in him subject to divestment by the performance of a condition subsequent by appellant Terzian, the payment of the full purchase price. If we apply

Platt v. Union Pacific R. R. Co., ante or *Phelps v. Harris,* ante, both Supreme Court of the United States decisions, or if we apply the rule of the overwhelming majority of state decisions such as *Scott v. State* or *State v. Deisting* or *State v. Julien,* all ante, the transaction in which appellants engaged is outside the purview of 26 U.S.C. 5848(10), the section which defines transfer in terms of "sale . . . or otherwise dispose of".

In the instant case, there being neither "transfer of title" because such transfer was conditioned upon payment of the full purchase price nor "transfer of absolute possession of the property" because of the condition subsequent discussed above, the transaction here involved fails to come within the word "sale".

Parenthetically, counsel for appellee has incompletely quoted C.C. 1721.3. On page 14 of the Brief for the Appellee the writer states that a sale may be absolute or conditional. To be correct the words "contract of" ought to be inserted before "sale" so as to read "a contract of sale or sale may be absolute or conditional". When this is done the obviously executory nature of a conditional sales situation becomes clearly apparent.

The legal distinctions between a sale, a contract to sell and a conditional sales agreement are elementary and are made patent and obvious by the text writer in 55 C.J. 39 and 41. A contract of sale is said to be distinguished from a sale in that "a *contract to sell* is merely a *promise,* of an *executory nature,* and until it is executed gives merely a right of action for its

breach or specific performance, and does not pass the property in the goods or chattel, whereas a sale is in the nature of a *conveyance* or *transfer of title*". See *Perata v. C. I. R.,* C.C.A. 9, 89 F. 2d 550, 552, where this court through Circuit Judges Wilbur, Mathews and Haney reversed a decision of the Board of Tax Appeals wherein the Board had assessed a deficiency against a taxpayer who had failed to report certain sums received in accordance with the terms of a syndicate agreement for the purchase of shares in a corporation, citing as authority for its ruling the language herein quoted from Corpus Juris.

Circuit Judge Haney, the writer of the Court's opinion, held that the agreement was a contract of sale and executory rather than an executed sale in the year for which the deficiency was assessed, thereby rendering invalid the deficiency.

A further distinction is made between contracts of sale and conditional sales agreements. The text writer in 55 C. J. 41, citing cases, states that "an executory contract of sale is distinguished from a conditional sale in that an executory contract is *absolutely to sell* at a future time while a conditional (sales) contract is *conditionally to sell;* in the one case the *performance* of the contract is *suspended* and deferred to a future time; in the other (conditional sale) the very *existence and performance* of the contract depends on a *contingency*". Citing additional cases the identical language is repeated in 77 C.J.S. 579. See also 78 C.J.S. 255 wherein the term "conditional sales" is distinguished from "sale" and an executory "contract of sale".

"[O]r otherwise dispose of" has offered no assistance as a method or device whereby appellants are brought within the ambit of 26 U.S.C. 5848 (10) "to transfer or transferred". The transaction in question, admittedly an executory one, is not within the plain meaning of the statute nor is the transaction impliedly with the statute, as has been developed herein. Under such circumstances, appellants' ambiguous status is manifest. They ought not to be convicted.

In sum, while Sections 5811, 5814 and 5851 detail what the taxpayer must do to comply with the statutes, no person is liable to perform these respective duties unless he is a taxpayer. He becomes a taxpayer only if machine guns were "transferred" within the scope of the chapter. If there was no taxable transfer, within the definitions of the statute, there is no tax due and payable. If no tax is due and payable, appellants may not be punished for their failure to pay the tax or make reports or possess the guns in question.

Although belabored by appellee, appellants' knowledge of the statute and its interpretation thus becomes meaningless. For the same reasons discussed above, likewise meaningless is appellant von Eichelberger's financial impoverishment.

What possible intent could Congress have had by the inclusion of 26 U.S.C. 5846, the "incorporation by reference" section. The administrative regulations promulgated by Treasury provide for monthly returns and payments pursuant to the chapters on Re-

tailers Excise Taxes (monthly returns and payments, Reg. 51, Secs. 320.70 and 320.71), and Manufacturers Excise Taxes (monthly returns and payments, Reg. 46, 1940, Sec. 316.200).

Thus Treasury has always considered that where partial payments are made on account of contracts which involve conditional sales, the seller, upon whom the duty to pay the tax is imposed, is not required to report each transaction as it occurs or each payment as it is received. He may wait a time with safety or at least until January 31 of the next year before he need account for partial receipts obtained in December of the previous year. As to partial payments received in January, these need not be reported until February 28 of the year in question.

Applied to the instant factual situation, at worst, appellant von Eichelberger ought to have filed a January tax return on the $25.00 which he received from appellant Terzian in December, 1956, had usual standards of reports, returns and payments been followed.

The "variable standards" argument developed in the opening brief is to appellee ingenious but unpersuasive. Perhaps it will cease to be unpersuasive when consideration is given to the material herein developed in appellants' briefs.

Brief examination will be made to the limitation of action Point III in both briefs. Appellants take the position that 26 U.S.C. 5851 in no wise purports to describe a continuing offense, and this is true even

though a statutory burden of persuasion is imposed upon a defendant to explain his possession to the trier of the fact. If appellee's argument were to prevail, one who retained possession of stolen government property could be prosecuted therefor even though he received such property ten years before. Compare *United States v. Mendoza,* D.C.N.D. Cal., 122 F. Supp. 367 with *Bowles v. United States,* 73 F. 2d 772, 775, certiorari denied, 294 U. S. 710. See also *United States v. Stony* (1869), 27 Fed. Cas. 16.282 regarding the time limits placed upon the government where defendant has been in continuous possession of property illegally smuggled into the United States.

In conclusion, it is respectfully submitted that appellants have amply demonstrated the inapplicability of the charging statutes to them. They further have demonstrated the capricious nature of those statutes. Under all of the circumstances their several convictions ought to be reversed.

Dated, San Francisco, California,
December 11, 1957.

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